P-1621, 1466/PA-93-1184 ORDER DENYING RECONSIDERATION AND ALLOWING ADJUSTMENT OF REFUND

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Don Storm	Chair
Tom Burton	Commissioner
Marshall Johnson	Commissioner
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In the Matter of a Request by Kantel Communications, Inc. for Authority to Transfer Assets to Peoples Telephone Company, Inc.

ISSUE DATE: January 25, 1995

DOCKET NO. P-1621, 1466/PA-93-1184

ORDER DENYING RECONSIDERATION AND ALLOWING ADJUSTMENT OF REFUND

PROCEDURAL HISTORY

On July 9, 1992, the Commission issued its ORDER SETTING REGULATORY REQUIREMENTS FOR STORE AND FORWARD AND INMATE-ONLY SERVICE PROVIDERS in Docket No. P-999/CI-91-22[1] (the store and forward docket). In that docket the Commission set rate caps and requirements for providers of pay telephone service who use store and forward technology. The requirements extended to providers of "inmate-only" store and forward service in correctional facilities.

On July 19, 1993, the Commission issued its ORDER AFTER RECONSIDERATION in the store and forward docket. The Commission stated that its July 9, 1992 Order setting regulatory requirements put inmate providers on notice that store and forward certification is necessary to provide inmate facility service, and that they must charge rates which are consistent with such authority. The Commission did not initiate a general refund proceeding against inmate providers who overcharged their customers. The Commission noted, however, that any requests for refunds could be handled on a case by case basis.

On August 15, 1994, the Commission issued its ORDER REQUIRING REFUND AND REFERRING MATTER TO OFFICE OF ATTORNEY GENERAL. In that Order the Commission required Kantel Communications, Inc. (Kantel or the Company), an inmate facility provider, to refund the $16,600 which it had overcharged customers from July, 1992, through January, 1993. The Company was ordered to first make refunds to any parties who filed complaints regarding overcharges during the period in question. The Commission ordered Kantel to distribute any remaining part of the $16,600 on a proportional basis to the correctional facilities where the calls originated. Because of a lack of information regarding the specific calls from the inmate facilities, the Commission ordered the facilities to apply the funds to their inmate recreational funds.

In the August 15, 1994, Order, the Commission also made a finding that Kantel knowingly and intentionally violated the July 9, 1992, Order by continuing to overcharge its customers. The Commission referred the matter to the Office of the Attorney General (OAG) for enforcement

[1] In the Matter of a Commission Investigation into the Use of "Store and Forward" Technology in Telephone Equipment Operated in Minnesota.

proceedings pursuant to Minn. Stat. § 237.461.

On September 2, 1994, Kantel filed a Motion for Reconsideration.

On September 12, 1994, the Department of Public Service (the Department) filed a reply.

The matter came before the Commission for consideration on January 10, 1995.

FINDINGS AND CONCLUSIONS

I. KANTEL'S MOTION FOR RECONSIDERATION

In its September 2, 1994, Motion for Reconsideration, Kantel requested three things: adjustment of the required refund; determination of the validity of the Commission's July 9, 1992, Order; reconsideration of the Commission's referral of the proceeding to the OAG for penalty proceedings.

A. Adjustment of the Refund

Kantel asked the Commission to adjust the refund to reflect the 6% bad debt charge which Kantel's billing company deducted from the Company's proceeds. Kantel asserted that its actual bad debts may have been considerably higher; the refund should at least be adjusted for the 6% mandatory deduction.

Kantel stated that the refund should be reduced by $591, the amount of overcharges assessed from July 1 through July 9, 1992. Kantel noted that rates and requirements for store and forward providers were not set prior to the Commission's July 9, 1992, Order. As the Commission itself noted in the August 15, 1994, Order, it would be unreasonable to require refunds for overcharges assessed prior to the July 9, 1992, Order.

Kantel argued further that the refund should be reduced to reflect lease payments paid by Kantel to the county inmate facilities. According to Kantel, the county facilities would overrecover if they were refunded the entire amount of the overcharge, without a credit to Kantel for lease payments already paid.

B. Validity of the Commission's July 9, 1992, Order

Kantel questioned the validity of the Commission's July 9, 1992, Order, because the Order was signed by someone other than the Executive Secretary. Minn. Stat. § 216A.04 states that the Executive Secretary shall prepare Orders, reports, and other materials. Kantel argued that the July 9, 1992, Order had no binding effect because the party signing the Order had not been appointed Executive Secretary or acting Executive Secretary.

C. Referral to the Office of the Attorney General

Kantel did not refute the fact that it had charged rates in excess of those allowed by the Commission. The Company argued, however, that mitigating circumstances rendered a penalty unwarranted.

Kantel stated that it is a Kansas corporation and was not conversant with Minnesota rules and statutes governing telephone service. After the July 9, 1992, Order was issued, Minnesota

counsel hired by Kantel incorrectly advised the Company that a pending motion for reconsideration stayed the effect of the Order. As a result of that advice, Kantel did not roll back its rates to the levels ordered in the July 9, 1992, Order until after January, 1993. While the Company and its Minnesota counsel now concede that the legal advice was in error, they argue that they acted in good faith and did not knowingly and intentionally violate the Commission's Order.

Kantel argued that it should not be referred for penalties because it acted in an open and straightforward manner with the Department and the Commission. In its reports to the Department, the Company stated clearly the rates it was charging.

Kantel asserted that the refund the Commission is requiring is already a penalty provision. Referral to the OAG for further proceedings could result in a double penalty.

According to Kantel, the Commission had previously faced similar circumstances and had found that a telephone company's good faith and ignorance of the law eliminated the need for penalty proceedings. Kantel cited two previous Commission decisions, the Downtown Telecom matter, Docket No. P-3162/CI-93-1331[2], and the Firstcom, Inc. matter, Docket Nos. P-3146/NA-93-1026; P-3146/M-93-1084[3].

In the Downtown Telecom docket, the Commission chose not to pursue penalties against Downtown Telecom (or Firstcom, Inc., which purchased Downtown) for reselling CENTRON service without obtaining a certificate of authority pursuant to Minn. Stat. § 237.16. The Commission stated that the Company should not be penalized because it had in good faith believed that its activities constituted private shared tenant service (PSTS), an exception to the certification requirement. In the Firstcom, Inc. docket, the Commission found that Firstcom's prior good faith, erroneous belief that it was exempt from Commission jurisdiction did not render it unfit to be certified.

Kantel asserted that its errors, too, were committed in good faith. For this reason, the Commission should not refer Kantel to the OAG for penalty proceedings.

II. COMMENTS OF THE DEPARTMENT

The Department supported Kantel's request for a $591 refund adjustment to reflect service rendered from July 1, 1992, to July 9, 1992. The Department had supported this refund reduction in the original proceedings.

In all other respects, the Department opposed Kantel's motion for reconsideration.

The Department stated that Kantel had offered no support for its bad debt claim. Even if there were bad debt losses, these should be considered an ordinary cost of doing business.

The Department argued that compensation received by the county for leasing facilities is irrelevant to the refund question. According to the Department, Kantel fails to recognize that a refund is an attempt to compensate customers (the people to whom calls were made) who were

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[2] In the Matter of a Commission Initiated Investigation into the Status of Downtown Telecom with Respect to the Resale of CENTRON Services.

[3] In the Matter of Firstcom, Inc.'s Request for a Certificate of Authority to Resell Long Distance Services in Minnesota; In the Matter of Firstcom, Inc.'s Request for a Certificate of Authority to Resell Local Exchange Telephone Services.

overcharged.

The Department stated that Kantel's argument regarding the validity of the July 9, 1992, Order is "absurd."

The Department opposed reconsideration of the Commission's decision to refer the matter to the OAG for penalty proceedings. The Department cited case law to support the notion that the Company both knowingly and intentionally acted in disregard of the Commission's Order.

Finally, the Department refuted the Company's argument that referral to the OAG, after assessment of a refund, could result in a double penalty to Kantel. The Department stated that a refund is meant to compensate customers for being overcharged by Kantel, not to penalize the Company.

III. COMMISSION ACTION

A. Adjustment of the Refund

The Commission agrees with the Company and the Department that the refund should be reduced to reflect service rendered from July 1, 1992, through July 9, 1992. The Commission's rates and requirements for store and forward and inmate-only service were first set out in the Commission's July 9, 1992, Order. Prior to that time, Kantel and other providers were not on notice of the rate cap. Although a record of specific calls placed from July 1 through July 9, 1992, cannot be produced, the Commission is satisfied with the Company's documentation showing the average number of calls which would have been placed during this period. The Commission will reduce the required refund by $591, the amount of the overcharge due to service provided from July 1, 1992, through July 9, 1992.

The Commission finds that no other adjustment to the refund is necessary or proper. The Company's bad debts and lease payments to the counties are irrelevant to the refund issue. These obligations are part of the normal cost of doing business; they are not part of the overcharge calculation. Kantel's costs of doing business should not impact the Commission's attempt to compensate the customers the Company overcharged.[4] If there is any question of an offset to the refund for lease payments, that question must be settled between Kantel and the counties.

B. Validity of the Commission's July 9, 1992, Order

The Commission agrees with the Department that Kantel's argument regarding the validity of the July 9, 1992, Order is without merit. The Commission has in effect a formal delegation of authority from the Executive Secretary to various Commission staff members, including the person who signed the Order. This document is on file with the Office of the Secretary of State; a copy has been provided to Kantel.

The signing of Commission Orders under the delegation of authority is a normal and necessary part of conducting Commission business. The fact that the July 9, 1992, Order was signed pursuant to the delegation has absolutely no bearing on the Order's validity.

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[4] Payment to the inmate facility recreational fund is an attempt to come as close as possible to compensating customers, since the names of the actual customers who were overcharged cannot be reproduced by the records.

C. Referral to the Office of the Attorney General

1. Introduction

The Commission finds that Kantel has raised no new argument which would cause the Commission to reconsider its decision to refer the matter to the OAG.

At p. 4 of its August 15, 1995, Order referring Kantel to the OAG, the Commission summarized the facts which warranted the referral for penalty proceedings:

The July 9, 1992, Order clearly and specifically set a rate cap for Kantel and other service providers. Although Kantel's rates were in excess of the Commission's authorized rates, Kantel chose not to reduce its rates to conform to the Commission's Order. As a result, customers were charged excessive, unauthorized rates for approximately seven months.

The Commission's July 9, 1992, Order stated that the Order "shall become effective immediately." Order at p. 14. Although the RUD-OAG petitioned for reconsideration of the Order, the petition did not prevent the Order from going into effect. Governing statutes and rules do not provide for any automatic stay or abeyance of an Order pending resolution of a reconsideration petition. Minn. Stat. Chapter 237. Neither did Kantel take the affirmative step of requesting or obtaining a stay of the July 9, 1992, Order. Minn. Rules, part 7829.3000, subpart 6. Absent an automatic stay through statute or rule, or a stay following request of a party, the Commission's July 9, 1992, Order was in force and effect from the date of its issuance. In this set of circumstances, the Company should have been aware of this fact and should have reduced its rates to comply with the July 9 Order. Failing to do so was a knowing and intentional violation of the Commission Order.

2. Knowing and Intentional Acts

Kantel noted that a knowing and intentional violation of a statute, rule or Commission Order is a prerequisite for enforcement proceedings under Minn. Stat. § 237.461. Kantel argued that its errors were committed in good faith and that its actions thus did not constitute a knowing and intentional violation of the Commission's July 9, 1992, Order.

The Commission does not agree. The Commission finds that Kantel's actions were knowing and intentional under precedent found in relevant case law.

In Claude v. Collins, 507 N.W. 2d 452, 456 (Minn. App. 1993), aff'd in part, 518 N.W. 2d 843 (Minn. 1994), the Minnesota Court of Appeals drew from criminal law to determine if public officials who violated the Open Meeting Law without knowledge of the law nevertheless acted knowingly and intentionally. The Court held that an intentional act is committed when "the actor has a purpose to do the thing or cause the result specified" and the actor has "knowledge of those facts that are necessary to make the actor's conduct criminal." The Court held that the public officials who violated the Open Meeting Law committed an intentional violation of that law, notwithstanding their ignorance of the law's provisions.

Kantel had specific knowledge of the Commission's rate requirements. Kantel knew that its rates for the provision of inmate service were in excess of the Commission's rate caps. Kantel chose not to roll back its rates to bring them within the bounds set by the Commission. Kantel knowingly and intentionally violated the Commission's July 9, 1992, Order. Poor advice from counsel or lack of familiarity with Minnesota law do not excuse or mitigate Kantel's knowing and intentional acts.

3. The Commission's Firstcom and Downtown Telecom Decisions

The Commission also disagrees with Kantel's assertion that prior decisions in the Firstcom, Inc. or Downtown Telecom cases require the Commission to find that Kantel's good faith mitigates its violation. The Commission has the discretion and the duty to examine each individual set of facts to determine if they warrant referral to the OAG under Minn. Stat. § 237.461. The Commission finds that the facts in Firstcom and Downtown were distinct from the Kantel situation in a number of important ways.

In the July 20, 1994, Downtown Telecom Order, the Commission found that Downtown Telecom had originally planned to use PBXs to provide PSTS service--the only configuration which would have qualified Downtown Telecom as a true, nonjurisdictional PSTS provider. Downtown Telecom chose CENTRON service instead after Northwestern Bell Telephone Company heavily promoted CENTRON as an alternative PSTS vehicle. After subscribing to CENTRON, Downtown Telecom filed comments in the Commission's proposed PSTS rulemaking, under the mistaken belief that it was actually a nonjurisdictional PSTS provider. These facts indicate that Downtown Telecom entered into a good faith belief that it was a nonjurisdictional PSTS provider, based on the assertions of a third party.

Downtown Telecom was first apprised in a January, 1993, Order in the local resale docket[5] that the PSTS jurisdictional exemption only applies to the provision of certain PBX services. Although the Company did not file for a certificate of authority until October, 1993, the delay was due to the sale of Downtown Telecom to Firstcom, Inc. and the subsequent protracted illness of Firstcom's owner. The Commission found that these circumstances substantially interfered with Firstcom's ability to file a timely petition for certification.

In the July 20, 1994, Firstcom, Inc. Order granting Firstcom, Inc. a certificate to resell CENTRON service, the Commission again found that Firstcom, Inc. had been operating under the erroneous but good faith belief that it was exempt from Commission jurisdiction. The Commission noted that Firstcom, Inc. is a small business whose failure appeared isolated in nature. The Commission found that Firstcom, Inc. had the requisite fitness to provide telecommunications service in Minnesota.

The Commission finds that the unique mitigating facts of the Downtown Telecom and Firstcom, Inc. cases do not apply to the Kantel case. In Kantel, there were no misleading representations by a third party, no sale of the company, and no lingering illness of the owner of a small business. Kantel's main argument is that it is an out-of-state company which relied on the erroneous advice of Minnesota counsel. While the Commission does not believe that Kantel acted with malice in this case, the Commission does not find that the facts warrant reconsideration of the referral decision. The Commission cannot excuse out-of-state companies from compliance with regulatory statutes, rules, and Orders, simply on the basis of the Company's ignorance of Minnesota law. There are a number of out-of-state companies currently providing telecommunications service in Minnesota. The Commission has the right to expect regulatory compliance from those companies, and the duty to enforce compliance if necessary.

The Commission will not reconsider its decision to refer Kantel's violation of the Commission's July 9, 1992, Order to the OAG for penalty proceedings. If a penalty is assessed against the Company, it will not be a double penalty. The refund the Commission has ordered is distinct from a penalty. A refund is the Commission's attempt to make whole, as nearly as possible, the customers who were affected by the Company's overcharging.

ORDER

1. The Commission reduces the refund required of Kantel in the August 15, 1994, Order by $591, to reflect overcharges for service from July 1, 1992, through July 9, 1992.

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[5] In the Matter of a Commission-Initiated Proceeding to Determine Whether Resale of Local Telephone Service is in the Public Interest, Docket No. P-999/CI-90-235.

2. The Commission denies Kantel's request for reconsideration in every other respect.

3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)